In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, APPELLANT,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (App. A, *infra*, pp. 16-22) is reported at 158 F. Supp. 33.

JURISDICTION

This suit was brought under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 4, commonly known as the Sherman Act, to prevent and restrain continuing violations of Section 1 of that Act.

The order of the district court dismissing this action was entered on January 28, 1958 (App. B, *infra*, p. 23) and the notice of appeal was filed in that court on February 21, 1958. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U.S.C. 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

The following decisions sustain the jurisdiction of this Court to review the order on direct appeal in this case: *United States* v. *Yellow Cab Co.*, 332 U.S. 218; *United States* v. *New Wrinkle, Inc.*, 342 U.S. 371; *United States* v. *Employing Plasterers Association*, 347 U.S. 186; *United States* v. *Employing Lathers Association*, 347 U.S. 198.

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> * * * * *
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> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to

prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provisions of Sections 310(b), 311 and 313 of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 310(b), 311 and 313), are as follows:

Sec. 310(b). No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. * * *.

Sec. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313.

Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio ap-

paratus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date of the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission in approving an exchange of broadcasting licenses precludes the United States from subsequently maintaining a Sherman Act suit charging (a) a conspiracy in restraint of trade which was partially effectuated by a broadcasting station acquisition involved in the license exchange approved by the Commission, and (b) a contract in restraint of trade, namely, the station exchange agreement.

2. If question 1 is answered in the negative, whether the district court erred in dismissing the action on the further ground that, under general equitable principles such as laches and estoppel, the United States is precluded from obtaining relief against the Sherman Act violations charged in the complaint.

STATEMENT

On December 21, 1955, the Federal Communications Commission, pursuant to Section 310(b) of the Communications Act of 1934, approved without a hearing an exchange of broadcasting licenses between appellee National Broadcasting Company ("NBC") and Westinghouse Broadcasting Company ("Westinghouse"). The Commission's action became final thirty days thereafter and the stations were exchanged on January 22, 1956.

On December 4, 1956, the United States filed a civil suit under Section 4 of the Sherman Act charging Radio Corporation of America ("RCA") and NBC (its wholly-owned subsidiary), with violating Section 1 of that Act. The complaint alleged (1) that since about March 1954, the defendants had been "continuously" engaged in an unlawful combination or conspiracy to restain trade, and (2) that the station exchange agreement between NBC and Westinghouse was in unreasonable restraint of trade. This combination or conspiracy, it was alleged, consisted of a continuing agreement between RCA and NBC to obtain VHF (very high frequency) television stations for NBC in five of the eight primary markets of the United States (NBC then had such stations in three of those markets), by the unlawful use of NBC's power as a network to grant or withhold network affiliation from

non-network station owners; and that this combination or conspiracy had been "effectuated * * * in part" through NBC's acquisition of Westinghouse's Philadelphia VHF television station. The relief requested was that the court adjudicate that the conspiracy or combination, and the exchange agreement, were illegal; require NBC to divest its Philadelphia station; grant injunctive relief; and require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets (prayer in complaint; plaintiff's answer to defendants' interrogatory No. 24(c), filed April 30, 1957; transcript of argument on November 26, 1957, p. 37).

In their answer, appellees raised the following affirmative defenses: (1) that the action was barred by the administrative finality of the Commission's action; (2) that the district court lacked jurisdiction over the subject matter of the suit; and (3) that the doctrines of *res judicata* and collateral estoppel precluded the Government from maintaining the action. The Government then moved, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, for a preliminary hearing and determination before trial of the sufficiency of these three defenses.[1]

The parties entered into a stipulation "for the purpose of any determination of the merits of" the three defenses. The stipulation stated, *inter alia*, that after NBC and Westinghouse had filed their applications with the Commission for approval of the station exchange, the Commission notified the Department of Justice that the applications raised possible antitrust

[1] Thereafter, appellees filed a motion to dismiss the complaint for lack of jurisdiction or, in the alternative, for summary judgment in their favor, based on these affirmative defenses.

questions; that the Commission conducted an extensive investigation of the proposed exchange and the negotiations leading to it, and kept the Department of Justice fully informed as to the evidence which it had in respect thereto; that in considering the proposed exchange, the Commission "had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws," and that the Commission "decided all issues relating to the exchange which it could lawfully decide"; that in granting the applications the Commission "had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action"; and that although the Department of Justice had the right to request that the exchange applications be set for hearing, to request re-consideration, to protest the Commission's decision, and to obtain judicial review of the decision by appeal under the Act, it did not "exercise any of these rights."

On January 10, 1958, the district court held that the three affirmative defenses were "valid and constitute a bar to the prosecution of this suit." The court upheld appellees' contention that under Section 402 of the Communications Act, appeal to the Court of Appeals for the District of Columbia Circuit is the "exclusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit."

It further ruled that, even if it had jurisdiction, it could not "properly exercise it." The court stated that the Commission had before it all the evidence on which the antitrust suit was based; that the Commission was "under a duty to pass upon the issues pre-

sented by this evidence"; and that there was "no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States."

Finally, the court held there was an additional "compelling reason why this suit should not be proceeded with." The court stated that the Commission's approval was not granted until more than four months after the Antitrust Division had been officially notified of the proposed transaction "and alerted for possible antitrust features"; that the transaction was consummated after the time for appeal from the Commission's order had expired and it involved an exchange of millions of dollars worth of property, $3,000,000 in cash, and "extensive changes in personnel, organization and operating procedures"; and that the present suit "presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming."

THE QUESTIONS ARE SUBSTANTIAL

1. The district court held that the action of the Federal Communications Commission in approving an exchange of broadcasting licenses bars the United States from subsequently maintaining a civil suit to enforce the Sherman Act, in which the exchange is challenged both as an unreasonable restraint of trade and as a step in partial effectuation of a broader conspiracy to restrain trade. This novel holding that the Commission thus may provide exemptions from the Sherman Act in the broadcasting field has no support in

either the language or the legislative history of the Communications Act, and is contrary to the settled principles governing the respective jurisdictions of the Commission to enforce the Communications Act and of the district court to enforce the Sherman Act.

In approving the exchange, the Commission acted pursuant to Section 310(b) of the Communications Act, which permits transfers of station licenses only upon a "finding by the Commission that the public interest, convenience, and necessity will be served thereby." Section 313 of the Act (to which the district court did not refer in its opinion) makes applicable to broadcasting "[a]ll laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade"; and it authorizes a district court to revoke a license upon finding, in any suit brought to enforce such laws, that a licensee has violated those laws. Section 311 directs the Commission to refuse a station license to any person whose license has been revoked by a court under Section 313.

The clear purport of these provisions is that although "competition is a relevant factor [for the Commission to consider] in weighing the public interest" (*Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94; see, also, *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 33-34 (C.A.D.C.)), it is the courts and not the Commission which have the duty of passing on Sherman Act violations. There is nothing in the Communications Act which indicates that Congress intended that Commission approval of a transaction as in the public interest confers antitrust immunity.

On the contrary, in view of the settled principle that exemptions from the Sherman Act are not to be implied (*United States* v. *Borden Co.*, 308 U.S. 188; *United States Alkali Export Association* v. *United States*, 325 U.S. 196), the meaning of Section 313 is that, no matter what the Commission may do in performing its regulatory functions, the antitrust laws remain fully applicable to broadcasting, and are to be enforced through district court proceedings. The Communications Act "recognizes that the field of broadcasting is one of free competition" (*Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474) and, as this Court has recognized (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223), the Commission is not charged with "the duty of enforcing" the Sherman Act. Nor does it purport to do so. See *Mansfield Journal* case, *supra*, at 33.

If there were any doubt that Commission action in the broadcasting field does not confer antitrust immunity, it is put to rest by the fact that the provisions in the Communications Act governing consolidations and mergers of telegraph companies specifically provide that if the Commission, after hearing upon notice to the Attorney General and other interested public officials, approves such merger or consolidation as in the public interest, "any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger." Section 222(c)(1), 47 U.S.C. 222 (c)(1). A similar exemption is provided for consolidations of telephone companies which the Commission approves. Section 221(a). There is no comparable grant of immunity, however,

for transactions which the Commission approves in the broadcasting field.

This case, therefore, is significantly different from *Far East Conference* v. *United States*, 342 U.S. 570, on which the district court relied. For there, as in the case of mergers and consolidations of telegraph and telephone companies under the Communications Act, the statute involved (the Shipping Act, 1916) specifically provides an antitrust exemption for agreements approved by the Federal Maritime Board. Furthermore, under the Shipping Act, the Board could provide adequate relief against the dual-rate system which was challenged in *Far East* (see 342 U.S. at 573-574). However, the Federal Communications Commission plainly cannot provide effective relief against the conspiracy charged in the instant case (see *infra*, pp. 12-13).

The court below relied on the fact that the last sentence of Section 311 originally had provided that "The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for * * * a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade * * *," and that this provision was eliminated by the Communications Act Amendments, 1952. The conference report on the amendments, however, states that the elimination of this provision is not "of any legal significance. It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law *the power of the United States* or of any private person *to proceed under the antitrust laws*

would not be curtailed or affected in any way." H. Rep. No. 2426, 82nd Cong., 2d Sess. (1952) p. 19 (emphasis added).[2]

There are sound practical reasons which dictate against construing the Commission's approval of the exchange transaction as conferring antitrust immunity. The Commission had before it, and necessarily could approve, only the particular exchange involved. The Government's complaint, on the other hand, also charged a broad and continuing conspiracy, of which the exchange agreement was only one step. One of the defendants in the Government suit (RCA) was not even a party in the Commission proceedings. The Commission could not have granted effective relief against the serious antitrust violations charged in the complaint. For even if the Commission had purported to adjudicate the antitrust violations (which, in the court below, it specifically denied having done), the only relief it could have given in its proceeding was

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[2] The court also relied on the statement in the Senate Committee Report (S. Rep. No. 44, 82nd Cong., 1st Sess. (1951) p. 9) that "there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals." But this statement does not support the court's conclusion that "the reason for striking out the sentence in question was that it was feared that it might permit the Government to proceed in cases like the present one to penalize parties for entering into transactions, cleared by the FCC after a consideration by it of all the evidence." On the contrary, the Senate Report indicates that what the Committee had in mind when it referred to "trial for the same allegations before two different tribunals" was the possibility that the Commission might "revoke the license of a person found guilty of antitrust violation if the court itself has not ordered such revocation" (*ibid.*). The Committee specifically pointed out (*ibid.*) that "alleged violations of the antitrust statutes * * * are the particular province of the Department of Justice and do not, by any other law, come within the jurisdiction of any independent quasi-judicial agency of government."

to deny the exchange applications. It could not have enjoined the conspiracy. The district court's statement that "[t]he Government had a complete remedy by appeal if it deemed the action of the Commission improper" overlooks the fact that the question on such appeal would be the correctness of the Commission's ruling that the license exchange would serve the "public interest, convenience, and necessity"—a far different question from those involved in the antitrust case. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67. The United States is not seeking in this case to overturn the Commission's approval of the exchange under the standards of the Communications Act, but to obtain effective relief against the Sherman Act violations charged in the complaint.

The short of the matter is that the Commission did not adjudicate whether appellees violated the Sherman Act, and Commission approval of the exchange agreement did not oust the district court of its exclusive statutory jurisdiction "to prevent and restrain" violations of the Sherman Act.

2. As a separate ground for dismissing the action, the district court held that even if it had jurisdiction, the Government was barred under general equitable principles from obtaining relief against the Sherman Act violations charged in the complaint. Relying on the stipulation that all the facts upon which the antitrust complaint is based were known to the Commission when it granted the exchange applications, and on the further fact that the defendants had made extensive operating changes as a result of the exchange, the court concluded that the case "presented no new facts and nothing which the Government had not known for

over a year, and no satisfactory explanation for the delay [in instituting the action] is forthcoming."

But the complaint was not untimely filed, since it charged a conspiracy which continued to the date of filing. The relatively short time which elapsed between the Commission's action and the filing of the complaint (eleven months) cannot operate to bar the Government from obtaining equitable relief against the serious antitrust violations charged in the complaint. Moreover, since the Commission did not purport to adjudicate the antitrust violations, NBC (RCA not having been a party before the agency) cannot fairly contend that it consummated the transaction in reliance on any implied understanding that Commission approval would bar future antitrust proceedings by the United States—proceedings in which, as we have noted, relief is sought not only against the exchange but also against the conspiracy of which it was a part.

This Court has pointed out that a "trial court upon a finding of a conspiracy in restraint of trade * * * has the *duty* to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 88 (emphasis added); see, also, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188. If the Government can prove its charges against appellees, we believe that the trial court would have a clear "duty" to grant appropriate relief, irrespective of the time which elapsed between the Commission's action and the filing of the complaint. Cf. *United States* v. *E. I. du Pont de Nemours*, 353 U.S. 586, where a district court was directed to grant equitable relief against

an antitrust violation involving a transaction consummated thirty-five years earlier. Principles such as "acquiescence, laches, or failure to act", which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights. Cf. *United States* v. *California*, 332 U.S. 19, 39-40.

CONCLUSION

The implications of the decision below are far-reaching in their impact upon the enforcement of the antitrust laws in the broadcasting field. We believe that the Communications Act reflects a clear Congressional intent that these laws are fully applicable to the broadcasting industry, and that Commission action cannot confer antitrust immunity. Since the decision below bars the Government from enforcing the Sherman Act against parties who, for the purposes of this appeal, must be assumed to have violated that Act, review by this Court is clearly warranted.

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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APRIL 1958.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21743

UNITED STATES OF AMERICA,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

Filed: 1-10-58

SUR MOTION UNDER RULE 12(d) TO DETERMINE THE SUFFICIENCY OF CERTAIN DEFENSES

KIRKPATRICK, *Ch. J.*

On January 22, 1956, National Broadcasting Company (NBC) exchanged its television and radio stations in Cleveland for those of Westinghouse Broadcasting Company (WBC) in Philadelphia. The transaction had been approved by the Federal Communications Commission (FCC) on December 21, 1955, and licenses duly granted. On December 4, 1956, the Government filed the complaint in this case praying that the Court adjudge the exchange agreement to be in violation of Section 1 of the Sherman Act and revoke NBC's license to operate the Philadelphia stations and divest it of its title thereto. The plaintiff has moved under Rule 12(d) for a preliminary determination of the sufficiency of certain affirmative defenses set forth in the answer.

Those defenses, in substance, are (1) that the appeal provided by the statute is the exclusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit, (2) that the Commission has determined the issues raised by this complaint, that that determination has become final and is a bar to the present action, under principles akin to res judicata and (3) that the plaintiff has forfeited its right to claim equitable relief by reason of the general equitable principles of laches and estoppel.

All facts relevant to the motion now before the Court have been stipulated.

(1)

Section 402 of the Communications Act (47 U.S.C., Sec. 402) provides for a judicial review of orders of the FCC by an appeal to the Court of Appeals of the District of Columbia. In Black River Valley Broadcasts v. McNinch, 101 F. 2d 235, the Court of Appeals, affirming an order dismissing the complaint in an action involving the Communications Act, brought by a private party, said "It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases." The case did not involve the antitrust laws but the later case of Far East Conf. v. United States, 342 U.S. 570, did. That was an action by the Government to enjoin a discriminatory system of shipping rates established by ocean carriers, members of the Conference. The regulatory statute involved was the Shipping Act and the administrative body, the Maritime Board, but I cannot see any reason to distinguish the basic considerations involved in that case and the present one. The Supreme Court held that the Dis-

trict Court could not proceed until the subject matter of the complaint had been passed upon by the Maritime Board, and dismissed the complaint, pointing out that if the Board's order should prove favorable to the United States it could be enforced by the District Court in a similar suit initiated later. Actually, the Far East decision, supra, presents a stronger case in favor of the Court's jurisdiction because there had been no submission of the questions involved to the Maritime Board and the Government was not, as it is in this case, confronted by an adverse ruling of the administrative body having jurisdiction, made after full consideration of the same evidence upon which it relied to support its action in the court. The same result has been reached in a number of other cases in which the reasons advanced by the courts were variously want of jurisdiction (Black River Valley Broadcasts v. McNinch, supra), the doctrines of primary jurisdiction (U.S. v. Western Pacific R. Co., 352 U.S. 59), administrative finality or its equivalent, the exhaustion of administrative remedies (Interstate Nat. Gas Co. v. So. California Gas Co., 209 F. 2d 380), all, however, involving the basic policy of supporting the rulings of administrative agencies against court review otherwise than as provided in the statutes creating the agencies, and of protecting the parties involved against "this type of double jeopardy . . . for the same allegations before two different tribunals." (Conference Report on Amendments to the Communications Act). This policy is so deeply imbedded in the law and the reasons on which it is based are so compelling that it goes far toward resolving any doubt about the appeal being the exclusive remedy in cases like this.

I have considered the plaintiff's argument based on the legislative history of the amendment to Section 311 of the Communications Act. The fact is that Section

311 of the original Act of 1934 contained a sentence providing that the granting of a license should not estop the United States from proceeding against licensees for violations of the antitrust laws and that Congress in reenacting the Section in 1952 struck out that sentence. The plaintiff argues that the Act is to be read exactly as though the sentence in question had not been stricken out, basing its position on a statement in the Conference Report that the elimination would be of no significance and that the power of the United States to proceed would not be curtailed or affected. Assuming that a provision, removed from a statute by the Congress, can be continued in full force and effect because a congressional committee thought it was unnecessary surplusage—a somewhat doubtful proposition—it would seem that what was intended to be conveyed to Congress by the Report was that a grant of a licensee would not free a license from accountability in the courts for subsequent violations of the antitrust laws arising from the misuse of the powers acquired by the license. Unless that was what the Committee meant, its subsequent statement, quoted above, would be wholly inconsistent with the first part of its report. In the light of the statement that the Committee "believes there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals", it would seem that the reason for striking out the sentence in question was that it was feared that it might permit the Government to proceed in cases like the present one to penalize parties for entering into transactions, cleared by the FCC after a consideration by it of all the evidence.*

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*I doubt that the foregoing discussion is of very great value. It seems that it is going rather far afield for a court to apply itself to interpreting a somewhat ambiguous Committee Report

(2)

But even if this Court had jurisdiction of this cause, I do not think it could properly exercise it. The FCC requested and obtained from the parties all of the information which the Government now has and on which it bases this suit. The FCC was under a duty to pass upon the issues presented by this evidence. The parties have stipulated that the FCC decided all issues relating to the exchange which it could lawfully decide. There is no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States. Later statements by its chairman, as well as the statements contained in an opinion of one of the commissioners in granting the license, which may be construed to mean that the FCC did not consider that the Government would be precluded from prosecuting, by its decision, cannot affect the outcome.

In no sense does such a decision operate to oust the courts of jurisdiction nor is any remedy taken away. The Government had a complete remedy by appeal if it deemed the action of the Commission improper. The Antitrust Division was at all times fully apprised of the proceedings and of the facts upon which the Commission acted. The Government did not appeal, and waited for approximately one year before it began the present suit which admittedly is based on nothing which the Commission did not have before it. Under these circumstances, the orderly administration of law re-

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rather than reading the statute as written. However, in view of the growing importance which courts appear to be giving to such matters in interpreting statutes, it seemed proper to consider the argument of the plaintiff and of the FCC, based on their views of the legislative history.

quires that this Court dismiss the action, whatever might be proper in other cases where facts are not known to the Commission or where the parties engage in unlawful conduct after the granting of the license.

(3)

But assuming that the Government's contentions up to this point are all correct, there remains a compelling reason why this suit should not be proceeded with. In appealing to the Court's discretion to exercise its equitable jurisdiction, the Government stands in no different position from that of a private individual. It has never been held that the Government is entitled automatically to equitable relief upon a showing that a defendant has committed a violation of the law. In Hecht Co. v. Bowles, 321 U.S. 321, 329, a violation of the Emergency Price Control Act was established. The Supreme Court, however, reversed the Court of Appeals, holding "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. . . . We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.'" and again in Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 377, "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief."

In the present case the parties presented the Commission with full information, received permission for the transfer in a proceeding which covered six months, and consummated the transaction a month thereafter. It may be noted that the Commission's approval was not

granted until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features. The consummation of the transaction occurred after the time for appeal from the Commission's order had expired. It involved not only an exchange of millions of dollars worth of property but $3,000,000 in cash, together with extensive changes in personnel, organization and operating procedures. The present suit was not filed until December 1956, and it presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming.

In accordance with Rule 12(d) I make the determination that the Third, Fourth and Fifth defenses are valid and constitute a bar to the prosecution of this suit.

An appropriate order may be submitted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC., DEFENDANTS.

ORDER

Now, this 28th day of January, 1958, in accordance with the opinion filed herein on January 10, 1958, this action is hereby dismissed.

KIRKPATRICK,
Ch. J.

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